

**Testimony**  
**of the**  
**National Grain and Feed Association**  
**before the**  
**Subcommittee on Surface Transportation and**  
**Merchant Marine**  
**Committee on Commerce, Science and**  
**Transportation**  
**U.S. Senate**  
**March 31, 1998**

Chairperson Hutchison and members of the subcommittee. My name is Ed Laur, I am Vice President, Attebury Grain Inc., Amarillo, Texas, and am a member of the Rail Shipper/Receiver Committee of the National Grain and Feed Association (NGFA®). I am accompanied by Kendell Keith, President of the Association.

The NGFA is the U.S.-based nonprofit trade association of about 1,000 grain, feed and processing firms comprising 5,000 facilities that handle more than two-thirds of all U.S. grains and oilseeds. Founded in 1896, our membership encompasses all sectors of the industry, including country, terminal and export elevators; feed mills; cash grain and feed merchants; end-users of grain and grain products, including processors, flour millers and livestock and poultry integrators; commodity futures brokers and commission merchants; and allied industries, such as banks, railroads, barge lines, grain exchanges, insurance companies, computer software firms, and engineering and design/construct companies. The NGFA also consists of 36 affiliated state and regional grain and feed associations, including the Texas Grain and Feed Association.

## **U.S. Agriculture Needs Market Access More Than Ever**

We appreciate the opportunity to testify as the grain shipping, processing and export industries, and as a major segment of U.S. agriculture. Grain forms the basic ingredient of a wide variety of consumer foods and its reliable production and distribution are important both to consumers and the national economy.

U.S. agriculture also is a major contributor to the livelihood of our nation's freight railroads. As illustrated in the following table, agricultural products account for 17 percent of the rail car loadings, 21 percent of the tonnage shipped by rail and 21 percent of the revenue earned by U.S. rail carriers.

### U.S. Agriculture's Contribution to Rail Volume/Revenue (1996)

<b>Commodity</b>	<b>Cars Loaded</b>	<b>Tons Loaded</b>	<b>Rail Revenue Generated</b>
Corn	716,862	70,657,220	\$ 1,207,621,064
Wheat	479,034	47,331,249	989,386,843
Soybeans	220,157	21,420,201	298,301,474
Other Grains	191,798	16,806,997	336,335,152
Non-Grain Farm Products	167,076	6,718,489	242,102,565
Grain Mill and Feed Products	653,827	52,911,700	1,020,472,043
Food and Kindred Products	856,050	46,316,754	1,654,136,651
Forest and Lumber	958,794	68,217,281	1,757,701,918
Fertilizer and Related Materials	802,452	74,069,071	898,382,320
Agricultural Products	5,046,050	404,448,962	\$ 8,404,441,030
Total Non-Agricultural Products	24,677,259	1,518,581,910	\$ 31,218,092,246
<b>Total</b>	<b>29,723,309</b>	<b>1,923,030,872</b>	<b>\$ 39,622,533,276</b>
Agriculture's Share of Total (%)	17.0%	21.0%	21.2%

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*Source: U.S. Department of Agriculture*

U.S. agriculture is undergoing a major transition, from being heavily influenced by government to one of less government and more market freedom. The 1996 farm law that opened the door to greater planting flexibility for producers also phases out the government's financial support of farmers, challenging agriculture to expand farm income from the marketplace and to aggressively pursue export markets. To achieve that outcome, reliable transportation services of all kinds are an absolute must. Predictable access to markets -- whether to ports to load oceangoing vessels or to poultry and hog farms or flour mills to keep products growing and moving into consumer channels -- is highly necessary if this new farm policy is to be successful. If grain and its derivative products cannot be delivered in a predictable manner, domestic and global customers will

go elsewhere as we watch our markets shrink. U.S. farmers expect and deserve the support of Congress and the federal government in assuring reasonable market access and predictability of transportation service.

How important is predictable rail service to U.S. agriculture? Upwards of 50 percent of all commercial grain movements to markets are carried by rail. In some western growing areas, it is not unusual to have 75 percent or more of shipments moving by rail. Railroads link the major production regions of the Midwest with processing, livestock and poultry operations on both east and west coasts, as well as all the ports. In the long-haul movements required to keep grain flowing reliably from production regions to points of consumption, rail is often the only viable economic alternative. Many grain shippers are located beyond effective trucking distances from markets and far from navigable waterway transportation.

Agricultural shippers are unique in their degree of dependence on rail transportation. Unlike other industries that may have some degree of freedom in choosing locations for plants or facilities, grain shippers are inextricably linked to areas of fertile ground where agricultural production is feasible. By its nature, farming and the agricultural shipping industry is decentralized – spread over a wide geographic region. Thus, the economic alternatives for transportation services are limited, and the performance and predictability of the railroad that serves a facility plays a critical role in the successful performance of the grain shipper's business. Few facilities have more than one railroad serving them. A survey the NGFA conducted in the early 1980s demonstrated that more than 90 percent of rail shippers' facilities were served by only one rail carrier.

## **Railroad Performance**

It is no secret that the disruptions that have characterized U.S. rail grain service, particularly in the western United States, since last June have been among the most severe

in modern rail history. What is most disconcerting to our industry is that the disruptions have occurred during a downturn in U.S. raw grain and oilseed exports in the past six months that is the result of large world crops, the Asian currency crisis and the higher-valued dollar. The U.S. Department of Agriculture now projects that both corn and wheat exports for the 1997-98 marketing year will be lower than the average of the 1990s.

Yet, despite this downturn in export markets, the lack of predictable, reliable rail service to move grain to domestic and export markets has further depressed local cash grain prices for farmers, and caused receivers of grain and grain products to sustain escalating costs and delays when originating grains by alternative modes.

This poor service performance by rail carriers has raised some important issues for our industry. Is there a way to assure railroad performance? Shippers at one time thought they could rely on “guaranteed” trains or “guaranteed” car-supply agreements, but in 1996, many shippers with such agreements found that even these agreements did not assure timely or predictable service. If rail carrier performance is this poor in an “off” year for agricultural exports, what will happen when export demand surges? Export demand for bulk commodities such as wheat, corn and soybeans tends to be erratic, responding to short-term needs driven by weather cycles or other events. When the United States has another opportunity to expand exports quickly, will we be in a position to respond? Is the United States reaching its practical capacity limits on moving grains and oilseeds by rail?

Railroads have expanded their businesses in intermodal and other traffic, capturing economic opportunities. While the railroads have the right to develop their businesses, many “traditional” rail shippers, including those from agriculture, are beginning to wonder if the growing national economy, and the apparent inability of some railroads to improve logistical management, will not ultimately constrain agriculture’s ability to grow.

Some in agriculture also are wondering where we stack up in the railroads’ “priority ranking.” As many agricultural shippers have a high degree of “captivity,” will

our industry be relegated to longer and longer wait times for equipment the stronger the national economy becomes and the more demand there is for rail service in other sectors? That's a critically important issue for our industry. Thirty to 40 percent of U.S. agricultural output has to move efficiently into export markets to maintain a healthy farm economy. If our transportation infrastructure restricts our ability to grow, the agriculture and food sector will be forced to shrink, and the commitment by Congress to support farmers with a market-oriented agricultural system will be imperiled. If agriculture's "unique" place in the shipping community results in less reliable performance, there may be a need to treat agricultural shippers differently under some provisions of the law.

## **STB Reauthorization**

The experiences of the last year in rail performance raise some serious issues. While we are not prepared to "ring the alarm" that a major shift in national transportation policy is called for, we advise the Congress that neither is this the time to affirm the status quo as being acceptable. We believe it would be a mistake to reauthorize the Surface Transportation Board (STB) without some substantive changes to the Interstate Commerce Commission Termination Act of 1995 (ICCTA). And even with some constructive amendments to the law, we would urge that the STB not be re-authorized for more than two years.

We have some serious reservations, for example, about how well the STB is performing some of its duties. Existing statutory constraints and directives may also prevent the STB from addressing rail users' concerns. In the case of "simplified non-coal rate guidelines<sup>1</sup>," the STB has issued a set of guidelines that are not simplified, will result in little if any cost savings to shippers seeking regulatory relief, and, contrary to the clear

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<sup>1</sup> Section 10701(d)(3) of the ICCTA directed the STB "to establish a simplified and expedited method for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." While the STB issued new guidelines on Dec. 31, 1996 (exactly on the one-year deadline imposed by Congress), the new guidelines are considered unworkable by both rail users and carriers.

intent of Congress, offer no relief to those wishing to challenge rail rates in a reasonable amount of time with a reasonable amount of money invested in legal counsel and rail-costing experts. The STB has acted once again as a barrier to problem resolution, not a problem solver.

A review of the decisions of the STB and the agency from which it was cloned (the Interstate Commerce Commission) reveals an unbroken line of decisions interpreting the law in a manner designed to advance and protect the interests of carriers and to frustrate simple and timely relief for rail users under provisions of law ostensibly enacted for the benefit of rail users and the public<sup>2</sup>. While we have some specific suggestions for amendments to the underlying law, we would urge that the continued existence of the STB be renewed for no more than two years, and that this subcommittee and the full Senate Commerce Committee take a more activist role in oversight of the agency during that period to ensure some reasonable level of performance.

One need look no further than the rail transportation policy found in existing law to detect the inherent bias of the current statute. For example, it states that it is the U.S. government's policy to ensure rail carriers "earn adequate revenues, as determined by the (STB)."

The touchstone of our industry is its belief in a capitalist, free-market system. No one is opposed to railroads generating sufficient revenues; indeed, that is essential if carriers are to dedicate sufficient capacity to serve U.S. agriculture. But we believe it is inappropriate for railroad revenue adequacy to be a stated policy of the U.S. government without giving equal consideration to the rights and remedies provided to rail shippers and receivers. The NGFA will suggest changes to correct this flaw, as well as language that would codify, as the primary objectives of rail transportation policy, the principles of

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<sup>2</sup> Examples include the so-called bottleneck cases, where the STB sharply circumscribed the ability of a shipper to obtain a separate challengeable rate for service over a captive railroad segment; and the Midtec decision, where the ICC determined that shippers are not entitled to rail-to-rail competition without proving what amounts to an antitrust violation.

competition, undue concentration of market power and reasonable rates in the absence of effective competition.

Further, the NGFA believes that if Congress reauthorizes the STB, it should commit up-front to providing 100 percent of the agency's funding through appropriations for the life of the reauthorization period. The alternative – making those who seek redress pay hefty user fees – is tantamount to erecting even higher barriers than already confront shippers and receivers in resolving rail problems.

## **Proposed Amendments to Current Law**

Now, let me discuss several of the substantive changes we seek in current law.

Because of the importance of rail transportation to our industry and to our farmer-customers, the NGFA has met with, and actively solicited input from, the major U.S. farm and commodity organizations in developing our recommendations. Earlier this month, the NGFA's Board of Directors approved a set of specific legislative proposals that we plan to explore with rail carriers during a series of meetings in April. We will explain each of the proposals, the long-festering problems each is designed to address, and seek their concurrence and support. We also will consider alternative approaches that rail carriers may wish to suggest that would be equally or more effective in addressing troublesome issues confronting rail grain users.

The NGFA's goals are clear: to achieve predictable, reliable rail service for U.S. agriculture by relying to the maximum extent possible upon market-based, non-governmental solutions. We also seek a more pragmatic, more effective, more business-like and less bureaucratic process for resolving rail disputes. We believe there are some areas where private-sector initiatives can effectively replace functions the STB has been attempting to perform – an initiative of further deregulation.

These goals have led us to the conclusion that **mandatory, private-sector arbitration** of certain specific types of rail disputes is worth exploring as a preferable alternative to submitting such disputes to the STB and the courts.

Our industry has a proven, successful track record when it comes to arbitration. The NGFA has operated such a system for over a century to resolve other kinds of disputes, such as those involving the trading of grains, oilseeds, feed, grain products and barge freight.

Our industry's experience has been that arbitration fosters a less adversarial environment. It encourages direct communication between businesses to work out problems. In fact, the mere existence of arbitration frequently results in parties resolving disputes before a formal case is ever filed.

In 1996, the NGFA's Bylaws were amended to provide access to arbitration on a voluntary basis by NGFA-member grain and rail firms. Arbitration also has been used successfully in Canada to resolve rail-shipper disputes. We think it's worth exploring with our rail partners taking the next logical step – **mandatory** arbitration of certain types of rail disputes before a private-sector forum mutually agreed to contractually by carriers and rail grain users.

Contrast the unbiased, expeditious and cost-effective qualities that are inherent in arbitration with the experience Montana grain shippers had at the STB and the ICC in the McCarty Farms case [*McCarty Farms Inc., et. al. v. Burlington Northern Inc.*]. That rate case took nearly 20 years to decide, at a cost to shippers of millions of dollars with a predictable result – a loss.

Contrast the certainty of a decision in arbitration with the recent experiences of a grain shipper whose petition seeking emergency relief against a carrier on a service

complaint has bounced back and forth between the STB and the courts, with no resolution in sight.

Next, the NGFA believes that the so-called **common-carrier obligation** found in current law **needs to be more specifically defined** for agricultural shipments so that it is meaningful. Our industry's experience has been that the current requirement that carriers provide "reasonable service on reasonable demand" is far too nebulous to be observed or enforced. Agricultural shippers and receivers need some clarity.

The existing law contains another section that has proven to be unenforceable. This provision [*49 U.S.C. Section 10709(h)*] ostensibly restricts to 40 percent the number of rail cars that a carrier can commit to agricultural transportation contracts. Experience has shown that some rail carriers use this provision as a shield to justify non-performance in providing regular general distribution (tariff) cars. The NGFA is willing to permit this provision of the statute to expire.

Given the increased importance to U.S. agriculture of serving markets, both domestic and foreign, the NGFA also **favors changes to current law that would provide shippers and receivers of grain and grain products that are located on a single carrier to gain access to switching points** where a competing carrier exists, so long as it does not unreasonably interfere with the switching carrier's ability to safely handle its own traffic nor obligate the carrier to supply cars to the shipper receiving the switch.

We also seek changes to the statute to address the so-called "bottleneck" rate case, in which the STB ruled that shippers cannot challenge the reasonableness of a point-to-point rate that is part of a through rate to a final destination. U.S. agriculture's concern is that this decision enables carriers to make it economically prohibitive for a shipper to access a market by establishing an excessive rate on the initial segment of the movement. The legislation (S. 1429) introduced by Senators Rockefeller, Dorgan and Burns contains

a provision that represents a good starting point for addressing this deficiency.

The NGFA also has several suggestions to **simplify the current law's market dominance test** that governs maximum rate cases so that both rail users and rail carriers can resolve such disputes in a cost-effective, timely manner.

Further, we have developed **proposals to address potential incidents of rate discrimination**. One such proposal is designed to protect against carriers unreasonably discriminating against certain shippers by assessing a higher rate for a shorter movement than rates that are charged to a competing shipper that is transporting a like kind and quantity for longer distances over the same line(s). We also want to discuss with rail carriers at what point they should bear the burden of proof in justifying the reasonableness of disparate rates charged to competing shippers for like movements. Current law places the entire burden on the shipper.

Finally, the NGFA has developed **proposals that would empower rail grain users to challenge the rates and terms imposed by rail carriers for railroad-owned land** on which an agricultural facility is located if the two parties cannot reach a mutual agreement. This concept is designed to protect against carriers making a facility noncompetitive by assessing exorbitant land lease rates or imposing excessive unjustified liability risk.

## **Conclusion**

The National Grain and Feed Association has shared its legislative ideas and suggestions with the Class I railroads, and will be meeting with individual carriers in coming weeks to discuss these proposals.

We enter into these discussions with an open mind, having identified the problems

we seek to address and the legislative changes we believe would resolve them. Our strong preference is to arrive at a consensus with rail carriers on as many issues as possible and to present joint proposals for legislative change to Congress. Where we have differences, we will give due consideration to constructive alternative approaches suggested by rail carriers. We also will continue our ongoing collaborative discussions with U.S. farm and commodity organizations. In the end, despite our best efforts at consensus-building, it may be necessary for U.S. agriculture to make its case for some legislative changes despite objections from some rail carriers.

Through this deliberative process, it also may be necessary to propose agriculture-specific rail legislative provisions that address U.S. agriculture's unique circumstances. As is the case with the current statute, it is unlikely that a "one-size-fits-all" approach for all industries will work. For example, having access to competitive rail service in rural America is quite different from the situation confronting manufacturing plants located near major switching districts. Certainly, disruptions in predictable, reliable rail service affect all sectors of U.S. industry. But while it is difficult and costly to relocate a manufacturing plant, it is impossible to relocate the Grain Belt.

In conclusion, we urge Congress to take the opportunity provided by the expiration of the STB's reauthorization to carefully consider the agency's future role and constructive, effective legislative changes that would foster market-based, private-sector solutions to rail carrier-shipper problems. While reregulation of the rail industry is unacceptable, so, too, is the status quo.

Thank you for this opportunity to testify. I would be pleased to respond to any questions you or other members of the subcommittee may have.